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No. 356

In the Supreme Court of the United States

OCTOBER TERM, 1960

HOMER HYCHE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
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OPINION BELOW

The opinion of the court of appeals (R. 208–211) is reported at 278 F. 2d 915.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 1960 (R. 211). A petition for rehearing was denied on July 21, 1960 (R. 221). By order of Mr. Justice Black, the time for filing the petition for a writ of certiorari was extended to August 30, 1960. The petition for a writ of certiorari was filed on August 23, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's appeal was properly dismissed untimely.

RULE INVOLVED

Rule 49(c), F.R. Crim. P., provides as follows:

> Immediately upon the entry of an order made on a written motion subsequent to arraignment the clerk shall mail to each party affected thereby a notice thereof and shall make a note in the docket of the mailing.

STATEMENT

After a trial by jury in the United States District Court for the Southern District of Alabama, petitioner was convicted of alcohol tax violations. The verdict was returned on December 2, 1959. On that day, after asking petitioner whether he had anything to say before sentence was imposed, and after ruling on counsel's motion in arrest of judgment, the court imposed sentence of fifteen months' imprisonment and a $5,000 fine to commence on January 7, 1960 (see Pet. App. A, p. 9). Written formal judgments were entered that day. Notice of appeal was filed December 15, 1959. Counsel for petitioner states that no notice of the entry of judgment was sent and that counsel did not discover that judgment had been entered until December 15, 1959 (Pet. 4).

The court of appeals dismissed the appeal as untimely under Rule 37(a)(2), F.R. Crim. P., pointing out that sentence had been imposed in open court in the presence of petitioner and his counsel (Pet. App.

ARGUMENT

etitioner's appeal was untimely under Rule 37 2) since filed more than ten days after entry of ment. See *United States* v. *Robinson*, 361 U.S. Petitioner argues that, since the clerk did not him written notice of the entry of formal judg- which he states was required by Rule 49(c), ime should be counted from the time his com- iscovered that judgment had been entered, rather from the date of the entry thereof. Rule 49(c) ts the clerk to send notice of "the entry of an made on a *written* motion subsequent to ar- ment" (emphasis added). Petitioner's motion rest of judgment, however, was made *orally*, and fore Rule 49(c) by its terms does not apply. reover, petitioner's motion was specifically de- in open court in the presence of petitioner and ounsel before sentence was imposed. There was o reason for petitioner to rely upon the clerk's sed obligation under Rule 49(c) to send notice. are *Hill* v. *Hawes*, 320 U.S. 520. Nor may the t case be likened to *Rosenbloom* v. *United* , 355 U.S. 80, on which petitioner relies, in this Court found that petitioner and his attor- ad a basis for doubting that the motion for a rial and judgment of acquittal had been for- denied, and the order entered. In the present therefore, petitioner's time for appeal started from the time he was sentenced in open court. *nited States* v. *Isabella*, 251 F. 2d 223, 225 (C.A. *uff* v. *United States*, 192 F. 2d 911 (C.A. 5), ari denied, 342 U.S. 946.

CONCLUSION

The decision below is correct and there is no con-
t of circuits. It is therefore respectfully sub-
tted that the petition for a writ of certiorari should
denied.

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